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POINTS RELIED ON

I.

The trial court erred in declaring Sections 700.525 through 700.541 RSMo unconstitutional because the statutes do not violate the due process clause of the United States Constitution in that the statutes do not extinguish a secured party's interest and they provide lienholders with notice that an abandoned manufactured home title is about to be issued so that lienholders may elect to take steps to further protect their security.

Belton v. Board of Police Commissioners, 708 S.W.2d 131 (Mo. 1986)

Dusenberry v. United States, 122 S. Ct. 694 (2002)

Moore v. Board of Education, 863 S.W.2d 943 (Mo. 1992)

II.

The trial court erred in declaring Sections 700.525 through 700.541 RSMo unconstitutional as to owners of manufactured homes because plaintiffs below had no standing to raise a takings claim on behalf of owners and the issue was not ripe in that plaintiff never claimed to represent mobile home owners and therefore never properly alleged any violation of the rights of mobile home owners.

Burkholder ex rel. Burkholder v. Burkholder, 48 S.W.3d 596 (Mo. 2001)

Metro Auto Auction v. Blunt, 707 S.W.2d 397 (Mo. 1986)

Missouri Outdoor Advertising Ass'n v. Missouri State Hwy. & Transp. Comm.,
826 S.W.2d 342 (Mo. 1992)

III.

Even if this court finds standing, the trial court erred in declaring the statutes unconstitutional because the statutes do not violate the due process clause of the Constitution in that they give manufactured home owners notice and an opportunity to object to the issuance of new title by providing proof that the home is not abandoned and/or to pay rent and prevent issuance of the title.

Dusenberry v. United States, 122 S. Ct. 694 (2002)

Belton v. Board of Police Commissioners, 708 S.W.2d 131 (Mo. 1986)

IV.

The trial court erred in declaring Sections 700.525 through 700.541 RSMo unconstitutionally vague because those statutes give a person of ordinary intelligence fair notice as to what the statute requires in that the statutes spell out that those with an interest must contact the Department of Revenue if they want their lien recorded on a newly issued title or if they want to object to the issuance of the new title.

Missourians for Tax Justice v. Holden, 959 S.W.2d 100 (Mo. 1997)

Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo.App. 1990)

JURISDICTIONAL STATEMENT

The Circuit Court held that Sections 700.525 through 700.541 RSMo (2000)¹ are unconstitutional because they violate the Due Process Clause of the United States Constitution. This action, therefore, involves the validity of statutes of the State of Missouri. This court has exclusive jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. Mo. Const. Art. V, Sec. 3.

¹All statutory references will be to the Revised Statutes of Missouri (2000) unless otherwise indicated.

STATEMENT OF FACTS

On August 30, 2001, Conseco Finance Servicing Corporation, formerly known as Green Tree Financial Servicing Corporation, filed a petition seeking injunctive relief against the Missouri Department of Revenue. L.F. 6. Conseco filed an amended petition. L.F. 2. Conseco was the only plaintiff in the action at that time. L.F. 13. In its amended petition, Conseco alleged that it held liens on certain manufactured homes in the State of Missouri and that those liens would be affected by the continued issuance of abandoned titles by the Department. L.F. 19. Although no home owners were named as plaintiffs, Conseco also alleged that the statutes unconstitutionally deprived owners of homes of their interests. L.F. 14. Therefore, plaintiff sought declaratory and injunctive relief. Count one of the petition asked for a declaration that §§700.525 to 700.541 were unconstitutional. L.F. 19. Count II asked for a declaration that §§700.525 to 700.541 do not “affect the right of a secured party to take possession of and title to, a manufactured home.” L.F. 20-21.

On September 6, 2001, the trial court issued a temporary restraining order enjoining the Department from issuing abandoned manufactured home titles. L.F. 11-12. The court subsequently extended the restraining order five times without additional briefing or any hearing or showing by respondent of continued harm. L.F. 40-44. The Department filed its answer on October 22, 2001 denying (due to insufficient information) Conseco’s allegations concerning its status as a lienholder. The Department also denied the allegations concerning the statutes’ affect on non-party owners. L.F. 32-37.

On November 16, 2001, Consecro filed a motion for leave to file a second amended petition adding two individuals. L.F. 38. The Department opposed the request for leave to file the second amended petition. L.F. 3.

On February 13, 2002 the trial court granted leave to file the second amended petition adding the two individuals. L.F. 3. On that same day, and without an answer from the Department, the court granted a permanent injunction and found that the statutes were unconstitutional because they took property without due process of law and because they were unconstitutionally vague. L.F. 50. In its conclusions of law the court held that the statutes unconstitutionally deprived “both owners and lienholders of manufactured homes (emphasis supplied)” of their property interests. L.F. 50

This appeal followed. L.F. 52-55.

ARGUMENT

I. The trial court erred in declaring Sections 700.525 through 700.541 RSMo unconstitutional because the statutes do not violate the due process clause of the United States Constitution in that the statutes do not extinguish a secured party's interest and they provide lienholders with notice that an abandoned manufactured home title is about to be issued so that lienholders may elect to take steps to further protect their security.

The trial court held that “the statutes at issue are unconstitutional in that they are confiscatory and violate the due process clause of the United States Constitution.” L.F. 50. But the trial court erred as a matter of law because the abandoned manufactured home statutes do not extinguish security interests and they give notice to lienholders before any action is taken. Lienholders have several options to prevent any action that may affect their ability to enforce their lien.

A. Standard of Review

Statutory interpretation is a question of law that the appellate courts review *de novo*. *Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. 2002). Statutes are presumed constitutional and may be found unconstitutional only if they clearly violate a constitutional provision. *State v. Brown*, 660 S.W.2d 694, 697 (Mo. 1983). Any doubt about the constitutionality must be resolved in favor of the law's validity. *State v. Young*, 695 S.W.2d 882, 883 (Mo. 1985).

In determining whether a statute violates the Due Process clause, the inquiry is whether “a person facing a deprivation of property receive[d] notice and an opportunity for hearing appropriate to the nature of the case.” *Belton v. Board of Police Commissioners*, 708 S.W.2d 131, 136 (Mo. 1986). The United States Supreme Court has recently clarified the test for analyzing claims that property was taken without due process. The three-part test found in *Mathews v. Eldridge*, 474 U.S. 319 (1976) is not an “all-encompassing test for deciding due process claims.” *Dusenberry v. United States*, 122 S. Ct. 694, 699 (2002). The real test is whether “under all the circumstances” the notice is reasonably calculated to inform interested parties of the pendency of an action and give them an opportunity to present their objections. *Id.*

B. The Abandoned Manufactured Home Title Statutes do not deprive lienholders of a property interest without due process.

The Abandoned Manufactured Home Title Act, sections 700.525 through 700.541, does not deprive a secured lienholder of a property interest without due process. The Act protects the security interests of lienholders while specifying a manner in which title can be transferred to the owner of real property upon which a manufactured home is abandoned. Should a lienholder wish to take title or possession of the property, the act gives them notice and an opportunity to do so. If the statute can be read otherwise – to affect a security interest – the security interest can only be compromised after notice and a lienholder’s failure to respond.

i. The Act Preserves the Security Interests of Lienholders

Statutes are to be read together with all other provisions of an Act and harmonized if possible. *Hagan v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. 1998). When read in light of this standard, the Abandoned Manufactured Home Act does nothing to destroy a lienholder's secured interest in a manufactured home. Indeed, the Act specifically preserves that interest. Section 700.527 does specify that a real property owner may take possession and title to a mobile home that is abandoned on his property. But he does so "subject to the interest of any party with a security interest in the manufactured home." 700.527 RSMo. This section makes clear that even if title and possession are transferred from the owner of the home to the owner of real property on which the home is abandoned, that home continues to be subject to the security interests of a secured lienholder. Section 700.530 also makes clear that the Act "shall not affect the right of a secured party to take possession of a home pursuant to [contract or law]."²

The only section in the Act that could be construed in any way to affect a lienholder's interest is Section 700.535. That section, however, is not in conflict with

² Section 700.530 specifically preserves rights under two statutes – "400.9-503 [and] 700.386" (sic). Section 400.9-503 (the UCC) has been changed and section 700.386 has never existed. Nevertheless, 700.530 goes on to preserve a secured party's interest as "otherwise allowed by contract or law." Therefore, the specific statutory references in 700.530 were, and are, superfluous.

Section 700.527. It does nothing to the security interest; it only allows a lienholder to waive his “claim to the manufactured home.”

When the Department sends out the notice specified in 700.531, the lienholder has 30 days to elect whether to forgo any claims he has to the manufactured home itself. During that time, a lienholder might exercise his claims to the home itself by: obtaining repossession title from the Department of Revenue (which he may do with only 10 days notice pursuant to Section 700.385); obtaining title in his own name directly from the landlord (by proving his security interest and paying all reasonable rents due and owing the landlord pursuant to Section 700.533); or by exercising any other contractual or statutory rights he may have to take possession of, and even dispose of, the home. *See* Sections 400.9-609, *et seq.*, RSMo (Supp. 2001). *See also Ferrell Mobile Homes, Inc. v. Holloway*, 954 S.W.2d 712, 715 (Mo.App. 1997) (party who is listed as a lienholder on a mobile home title has a perfected interest and is entitled to possession of the home).

But even if the lienholder elects to waive his claim to the home itself by taking no action, any new title is still subject to the lienholder’s security interest as specified in section 700.527 and as required by section 400.9-315 RSMo (Supp. 2001). Because any new title is always subject to the security interest, there is no deprivation of the security interest. The statute only operates to limit future options to obtain an additional property interest by possessing or obtaining title to the home in the secured party’s own name.

ii. **Even if the Act affects a lienholder's security interest, the lienholder is given notice and an opportunity to object.**

Even if this court chooses to read 700.535 as allowing the lienholder to waive his security interest, not just his option to obtain title or possession of the home, the statute does not violate due process. It gives notice and an opportunity to stop the issuance of the new title or to otherwise preserve the security interest – the elements required by due process. *Dusenberry v. United States*, 122 S. Ct. 694, 699 (2002). In *Dusenberry*, the Court held that the Constitution did not prevent a prisoner from being deprived of his property so long as the FBI sent him notice and gave him an opportunity to object to the deprivation. In that case, the court held that the prisoner's property was properly taken, even though he claimed not to have received the notice, because the prisoner had not objected within the 20 days specified by law. *Id.*

The notice here is constitutionally sufficient because it is even better than the notice approved in *Dusenberry*. Section 700.531 specifies that the director of revenue shall notify any holder of a security interest that the home is abandoned and shall supply the name and address of the person seeking to obtain abandoned title. In this case, the lienholder has 30 days from the “mailing or delivery of such notice by the director of revenue” to respond to the Director. §700.531. In *Dusenberry*, the FBI deprived individuals of their property 20 days after notice was first published regardless of when the notice was actually delivered or received. *Dusenberry*, 122 S. Ct. at 697. In this case the

lienholder has 30 days from delivery of the notice to make a decision on whether to exercise their options.

Giving the lienholder a choice after notice does not violate due process. *Warren v. Associated Farmers, Inc.*, 825 S.W.2d 901 (Mo. App. 1992) (plaintiff who had opportunity to challenge proposed dismissal of lawsuit yet took no action was not denied due process); *Moore v. Board of Education*, 863 S.W.2d 943, 947 (Mo. 1992) (“Due process merely affords the opportunity to be heard and, thus, a party can waive his right to be heard by voluntarily absenting himself from the proceedings”); *State ex rel. Highway Commission v. Lynch*, 471 S.W.2d 261, 264 (statute assessing interest in a condemnation case does not violate due process because “the landowner is afforded a choice” of whether to leave funds on deposit or owe interest if he withdraws funds).

If this Court chooses an interpretation of 700.535 that completely extinguishes the security interest, a lienholder still has all of the rights to pursue title and possession prior to the new title being issued as discussed above, and the lienholder has the additional right to notify the director of revenue that they wished to have their security interest recorded on the title. The only difference between the two interpretations discussed herein is what happens if a lienholder does not respond to the notice within 30 days of delivery.

The better reading is that the title is still subject to the lienholder’s security interest, but the alternative reading only deprives the lienholder of its interest if the lienholder chooses not to respond to a constitutionally adequate notice. The statutes do not offend due process. Lienholders receive notice under the statute and they have every opportunity

to take title, take possession, or maintain their secured position. The only way a security interest can be affected is if a secured party sits on its rights.

C. The Back Rent Provision Is Constitutional

Nor is it a deprivation of a property interest that section 700.533 requires the payment of back rent in connection with the enforcement of a security interest or as a predicate to obtaining title. *See Ferrell Mobile Homes, Inc. v. Holloway*, 954 S.W.2d 712 (Mo. App. 1997) (mobile home park owner’s right to back rent is dependent upon compliance with Section 700.527). At least one Missouri court has addressed the issue of whether a secured party must pay costs in order to obtain possession of the collateral. In *GMAC v. City of St. Louis*, 663 S.W.2d 408 (Mo. App. 1983), the court held that statutes giving towing companies a “superior right” to possess an abandoned vehicle were valid. The holder of perfected security interest could not replevin a vehicle unless they first paid storage fees. *Id* at 409.

Like the abandoned motor vehicle statutes, the Abandoned Manufactured Home Title statutes provide a statutory mechanism for the removal of abandoned property. To facilitate removal, the statutes compensate the party physically possessing and storing the abandoned property - the towing company in the case of abandoned cars, and the mobile home park owner in the case of abandoned mobile homes. *See* Section 304.155.8 (payment of reasonable towing and storage charges); Section 700.533 (payment of reasonable rent).

Other states have similar statutes that require the payment of back rent and create a superior statutory lien in favor of the mobile home park owner. *See e.g., Gulf Homes, Inc. v. Bear*, 599 P.2d 831 (Ariz. App. 1979) (under Arizona abandoned mobile home statute, park owner is entitled to 60 days' rent and utilities from lienholder if park owner gives notice to lienholder); *Cabre v. Brown*, 355 So.2d 846 (Fla. App. 1978) (mobile home landlord's statutory lien was superior to lien of secured party). Respondent Consecro, in fact, has found itself on the losing end of a similar dispute over its security interest in a mobile home. *See Green Tree Financial Servicing Corp. v. Young*, 515 S.E.2d 223 (N.C. App. 1999) (court held that defendant towing company's statutory lien on mobile home was superior to Green Tree's perfected security interest).

There is nothing unique or unconstitutional about the back rent provision in the Abandoned Manufactured Home Title statutes. These provisions simply elevate a landlord's right to be paid back rent above the right of the secured party to take title to the manufactured home. Again, the secured party is given notice and an opportunity to object to the taking of title. If he does so, by paying reasonable rent, he can retain title for himself. If he chooses to sit on his rights and not pay the rents, new title will be issued with the security interest still intact.

II. The trial court erred in declaring Sections 700.525 through 700.541 RSMo unconstitutional as to owners of manufactured homes because plaintiffs below had no standing to raise a takings claim on behalf of owners and the issue was not ripe in that plaintiff never claimed to represent mobile home owners and therefore never properly alleged any violation of the rights of mobile home owners.

Conseco below alleged that it marketed and originated loans in the manufactured housing industry. L.F. at 14. Conseco's first amended petition did not allege that they were owners of a manufactured home, nor did they allege any facts indicating that their right to ownership of a manufactured home had been threatened. L.F. at 13-25. The Department answered and both sides submitted legal memoranda based on the allegations in Conseco's first amended petition. L.F. 3-4. After briefing was completed, Conseco sought leave to file a second amended petition to add individuals as plaintiffs. L.F. 4 and 38. The Department objected to the request for leave. L.F. 3. The trial court granted the motion to amend and added individuals on the same day that it entered judgment. L.F. 4. The Department never had an opportunity to answer, seek discovery, or brief the issues related to the owners.

Conseco had no standing to raise any issues regarding the statutes' effect on homeowners, nor were these issues ripe. As Missouri courts have noted, the doctrines of standing and ripeness are closely related. *Metro Auto Auction v. Blunt*, 707 S.W.2d 397 (Mo. 1986). Courts may not render "advisory opinions" about matters or facts not before them. *See, e.g., Local 781 Int'l Assoc. of Firefighters v. City of Independence*, 947

S.W.2d 456 (Mo. App. 1997). No issues regarding homeowners were properly before the trial court. By holding that the statutes in issue deprived owners of abandoned homes of due process, the trial court erroneously rendered an advisory opinion about a matter that was not ripe because there were no facts in evidence nor argument concerning how the statute affects homeowners' rights.

Furthermore, the trial court had no evidence before it as to whether the individuals actually owned homes or what affect the statutes might have on them. A decision of the trial court may be reversed when it is not supported by substantial evidence. *Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 597 (Mo. 2001). In this case, there was absolutely no evidence to support the trial court's judgment that the statutes deny manufactured home owners of due process because the Department was not even given the opportunity to answer the petition prior to the entry of judgment.

Conseco is a lending company with security interests in certain manufactured homes - it never even alleged it was a homeowner. Nor did Conseco attempt to argue that it had some type of "organizational standing" on behalf of homeowners. *See, e.g., Missouri Outdoor Advertising Ass'n v. Missouri State Hwy. & Transp. Comm.*, 826 S.W.2d 342, 344 (Mo. banc 1992) (an organization can sue as a representative for its members if members have individual standing, interests are germane to the organization's purpose and neither the claim nor the relief require the participation of individual members). Conseco lacked standing to assert homeowners' claims and the court's Order as to homeowners is erroneous.

III. Even if this court finds standing, the trial court erred in declaring the statutes unconstitutional because the statutes do not violate the due process clause of the Constitution in that they give manufactured home owners notice and an opportunity to object to the issuance of new title by providing proof that the home is not abandoned and/or to pay rent and prevent issuance of the title.

If this court finds that the issues related to owners were properly before the court and it had the authority to issue a determination on the constitutionality of the statutes as they relate to owners, the court should find the statutes constitutional. The statutes give owners proper notice that title is about to issue. They also give owners an opportunity to object to and prevent the issuance of abandoned title. The Department incorporates by reference the arguments made in Point I above which apply equally to secured parties and to the owners of the manufactured homes.

A. The Notice to Owners is Adequate

Notice to owners is the same as to secured parties. It informs owners that abandonment has been alleged and that the landowner has the right to seek title. It also includes the name and address of the person seeking title. §700.531 RSMo. Owners have thirty days to respond to the Department of Revenue. §700.535. The notice is adequate under the law as explained in Point I.

B. The Owner has an Opportunity to Present their Objections and To Prevent the Issuance of an Abandoned Title.

Once the owner has received the notice required by §700.531, they have the opportunity to prove that the rents have been paid. §700.533. If the owner submits proof of ownership and proof that the rents have been paid, the manufactured home cannot, by definition, be abandoned. *See* §700.525(1). As a practical matter, there are two scenarios that might occur when an owner receives such notice. If the owner has actually paid their rents, the statutes allow them to submit proof of such to the Department of Revenue. Such proof would prevent deprivation of the owner's property because it would establish that the home is not actually abandoned and the Department cannot proceed under §700.529 to issue title to the landowner.

But the statutes afford even more protection. If the owner has not paid their rents, Section 700.533 allows the owner to claim title from the landowner seeking the abandoned title by paying the rents and submitting proof that all back rent has been paid. Therefore, the statute gives owners of manufactured homes a method both to contest the allegation that the home is abandoned and to remedy the fact of abandonment within a reasonable period of time.

Owners of manufactured homes are protected by the statutes. They get notice and an opportunity to object to the landlord's claim or even to defeat it altogether by fulfilling their rental obligations. Only if the owner voluntarily waives their claim by failing to

respond to the notice may their property be taken. The statutes do not violate due process.

Dusenberry, 122 S. Ct. at 699.

IV. The trial court erred in declaring Sections 700.525 through 700.541 RSMo unconstitutionally vague because those statutes give a person of ordinary intelligence fair notice as to what the statute requires in that the statute spells out that those with an interest must contact the Department of Revenue if they want their lien recorded on a newly issued title or if they want to object to the issuance of the new title.

Under Missouri law, the standard for determining whether a statute is void for vagueness is whether the terms or words used are of common usage and are understandable by persons of ordinary intelligence. *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52 (Mo. App. 1990). The statute must give a person of ordinary intelligence fair notice as to what conduct is required or forbidden. *Missourians for Tax Justice v. Holden*, 959 S.W.2d 100, 105 (Mo. 1997). Under this standard, the Abandoned Manufactured Home Title statutes are not unconstitutional.

The statutes spell out what a party is supposed to do to preserve its interest. If anyone - typically a mobile home park owner - applies for abandoned title, the Department notifies the homeowner and any secured party. They each have thirty days to notify the Department of any objections they may have. Alternatively, they may voluntarily relinquish their claim by not responding. Section 700.535. As discussed in Point I, the statutes may arguably be ambiguous as to what claim a secured party is relinquishing, but ambiguity is not vagueness. The statutes inform a person of reasonable intelligence that they must make

some response to the notice they receive if they want to protect themselves – otherwise they waive whatever claims they may have.

CONCLUSION

The abandoned manufactured home statutes articulate a system whereby land owners who have an abandoned manufactured home on their property can go about getting title to the home. The statutes do not unconstitutionally deprive either secured lenders or previous homeowners of their property without due process of law. Lenders and owners receive notice that the landowner wishes to have a new title issued and they have an opportunity to object to the issuance of the new title. In the case of lenders, the only parties before the court below, the security interest is never extinguished even if the lender does nothing. The judgment of the trial court was wrong and should be reversed and remanded with instructions to enter judgment in favor of the Department.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of June, 2002, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,205 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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